BUMI GAJAH AGENCIES

v.

KHINTAN ENTERPRISE SDN. BHD. & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
SITI NORMA YAAKOB J
[CIVIL SUIT NO. D4-23-2492-87]
29 MAY 1989

CIVIL PROCEDURE: *Garnishee proceedings - Application for leave to intervene - Dismissal of application for leave - Appeal against dismissal not filed within 5 days from date of dismissal order - Order 63 r. 1(3) - Application for extension of time to file notice of appeal - Whether mistake of solicitor's clerk merits the exercise of judicial discretion to grant extension of time.*

The plaintiff ("BGA") took out garnishee proceedings against the garnishee ("UAB") and the matter was fixed for hearing on 15 April 1988 for the garnishee to show cause why the garnishee order nisi should not be made absolute. On 15 April 1988 the applicant ("TISB") applied for leave to intervene in the garnishee proceedings. On 15 November 1988 the application for leave to intervene in the garnishee proceedings was dismissed. TISB did not file notice of appeal within 5 days from the date of dismissal order pursuant to O. 63 r. 1(3) of the Rules of the High Court 1980. TISB applied for extension of time to file notice of appeal. The affidavit in support of the application stated that notice of appeal was filed out of time because of the mistake of the solicitor's clerk.

Held:

[1] Mistake on the part of a solicitor's clerk can never be a good ground for an application to file a notice of appeal out of time.

[2] The discretion of a Court to extend time will only be exercised upon some material disclosed in the affidavit in support of the application and solicitor's negligence cannot possibly merit the exercise of judicial discretion.

[Application dismissed.]

Case referred to:
Tan Chai Heng v. Yeo Seng Choon [1981] 1 MLJ 271

Legislation referred to:
Rules of the High Court 1980, O. 63 r. 1(3)

For the applicant - T.H. Goh; M/s. T.H. Su & Co.
For the respondent/plaintiff - M. Mahalingam; M/s. Ganga Maha Wong & Co.

JUDGMENT

Siti Norma Yaakob J:

On 4 December 1987, final judgment for RM131,967.33 with interests was entered by consent against the defendant. The plaintiff then proceeded to enforce the judgment by obtaining a garnishee order nisi against United Asian Bank Bhd. (the garnishee) on 15 March 1988 and the garnishee was required to appear before the Senior Assistant Registrar on 15 April 1988 to show cause why the garnishee order nisi should not be made absolute.

On the hearing date, the applicant, Tatab Industries Sdn. Bhd. applied for leave to intervene in the garnishee proceedings but both the applications were adjourned to 15 November 1988, when the Senior Assistant Registrar held that since the plaintiff was entitled to the monies in the hands of the garnishee he accordingly dismissed the applicant's application for leave to intervene and made the garnishee order absolute.

Under O. 63 r. 1(3), the applicant had five days from the date of the dismissal order with which to appeal and excluding the intervening Sunday, it had until 22 November 1988 to do so. It's solicitors however, only did so on 23 November 1988 and being two days late, they have now applied for an extension of time to file the notice of appeal. In his affidavit the solicitor in charge of the matter blames his clerk for filing the notice out of time.

If that be the case, the solicitor took another six weeks within which to file the instant application for extension. It has been stressed time and time again that mistake on the part of a solicitor's clerk can never be a good ground for an application of this nature as the Rules of procedure are specially made to be strictly enforced and to that extent, unless otherwise stated, mandatory in nature. Be that as it may there must be some material disclosed in the affidavit in support of the application to justify a Court exercising its discretion to extend time and in this case negligence on the part of the applicant's solicitors cannot possibly merit the exercise of judicial discretion. See the case of *Tan Chai Heng v.Yeo Seng Choon* [1981] 1 MLJ 271. On that finding, I had dismissed with costs an extension of time to the applicant to appeal against the Senior Assistant Registrar's order dismissing its application to intervene in the garnishee proceedings.

Also found at [1989] 2 CLJ 991